Filed 5/18/10 Oliver v. Pacific Real Estate Holdings CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ALROY J. OLIVER et al., Plaintiffs and Respondents, v. PACIFIC REAL ESTATE HOLDINGS, INC. et al., Defendants and Appellants.	F057819 (Super. Ct. No. VCU217841) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Gilmore, Wood, Vinnard & Magness, Scott L. Jones and David M. Gilmore, for Defendants and Appellants.

G. Scott Benker, for Plaintiffs and Respondents.

-ooOoo-

Appellants contend that their defaults and a default judgment against them should be set aside because of respondents' failure to comply with certain statutory requirements. They also contend that the trial court erred in granting a request to reconsider one of its orders. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case is a companion case to a prior case that was before this court on appeal, *Oliver et al. v. Pacific Real Estate Holdings, Inc. et al.* (See *Oliver v. Pacific Real Estate Holdings, Inc.* (Aug. 8, 2008, F051193) [nonpub. opn.] (*Oliver*).) The parties on appeal in this case and in the prior case are identical. Moreover, the legal issues are essentially identical. The main difference between the two cases is the subject of the litigation between the parties. In the prior case, appellants failed to pay a corporate creditor, and respondents, as guarantors for one of the appellants, were sued by the corporate creditor. (*Id*. at pp. 2-3.) In this case, appellants failed to pay their corporate taxes to the California Board of Equalization, and respondents, as former officers, were sued by the creditor in an administrative action.

In the prior case, respondents filed a complaint seeking indemnification from appellants. Appellants did not timely respond to the complaint, and a default judgment was entered against them. Appellants then filed a motion to set aside the default judgment, which was denied. (*Oliver*, *supra*, F051193 at pp. 1 & 4.) On August 8, 2008, this court issued an opinion in which we vacated the default judgment against appellants because the complaint against appellants did not specify the amount of damages. (*Id.* at p. 9.) We then remanded to the superior court for "further proceedings consistent with this opinion." (*Id*. at p. 10.)

In this case, respondents filed their complaint against appellants on February 10, 2006. In the complaint, respondents sought compensatory and punitive damages according to proof. In the body of the complaint, respondents alleged that the amount of taxes, interests, and penalties owed to the Board of Equalization "exceeds $150,000." Respondents sought restitution relating to any collection activity by the Board of Equalization. In an attachment to the complaint, on a form pleading, respondents sought exemplary or punitive damages in the amount of "$500,000 or according to proof."

Defaults were entered against appellants "on or about April 12, 2006." Appellants then filed their motion to set aside the default on August 30, 2006. Appellants contended that the trial court lacked jurisdiction because of improper service. Appellants also contended that the default should be set aside because they justifiably relied on the promise of a third-party, The Artesia Companies, Inc., to defend them against the lawsuit and the third party failed to do so.

The trial court denied appellants' motion to set aside default on October 12, 2006. The trial court found that all the companies were interrelated with "Rune Kraft as either owner, an officer or manager or in control in some manner." The trial court also found that "Mr. Rune Kraft is attempting to evade service."

No further action occurred until this court issued our nonprecedential opinion in the *Oliver* case. On September 17, 2008, respondents served a proposed default judgment on appellants seeking $67,000 in damages, $30,000 in attorney fees, $8,000 in costs, and $500,000 in exemplary damages.

Appellants filed a response contending that the complaint failed to allege a specific amount of damages as required by Code of Civil Procedure section 580[1] and that the application for punitive damages did not comply with section 425.11.

On November 3, 2008, respondents filed an amended proposed judgment seeking $97,572.45 in damages and $292,717 in exemplary damages.

On November 20, 2008, appellants filed a response raising the same grounds.

On December 16, 2008, the trial court sua sponte issued an order denying respondents' application to release funds, vacating the default judgment, and ordering respondents to advise the court whether they would leave the default in place and reduce the judgment to $97,472.50 in compensatory damages or vacate the default. On

---

1 All further section citations are to the Code of Civil Procedure, unless otherwise indicated.

December 18, 2008, respondents filed a request asking the trial court to reconsider its December 16, 2008 order and address the issue of punitive damages. They asked the trial court to re-examine the complaint in this case. The trial court did so. It acknowledged that it missed the notice of punitive damages being sought in the complaint. The trial court then vacated its December 16, 2008 order and granted respondents' application to release funds in the amount of the default judgment, which was $97,572.45 in compensatory damages and $292,717 in punitive damages.

Appellants objected on the ground that the motion for reconsideration was not based upon new or different facts. Appellants also objected that respondents failed to comply with sections 425.10, subdivision (b), and 425.115 in seeking punitive damages. Finally, appellants contended that there was inadequate notice of damages because the amount of damages alleged in the body of the complaint was not repeated in the causes of action or prayer for relief.

On March 9, 2009, default judgment was entered in the amount of $97,572.45 in damages and $292,717 in punitive damages.

On May 8, 2009, appellant filed their appeal.

DISCUSSION

A. Statutory Requirements for Default Judgment

Appellant first contends that the default and default judgment should be void as a matter of law because appellants were not provided with formal notice as required by sections 580, 425.11, and 425.115. We disagree.

1. Section 580

Section 580 provides in relevant part that, "[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115; but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue." (§ 580, subd. (a).) According to the

California Supreme Court, "[t]he notice requirement of section 580 was designed to insure fundamental fairness.... Consequently, a prayer for damages according to proof passes muster under section 580 only if a specific amount of damages is alleged in the body of the complaint. [Citation.]" (*Becker v. S.P.V. Construction Co*. (1980) 27 Cal.3d 489, 494, fn. omitted.)

As an initial matter, we note that, by its plain language, section 580 does not directly affect the entry of default. It only affects the relief granted by the trial court, such as a default judgment. Thus, failure to comply with section 580 does not necessarily void entry of default. Rather, failure to comply with section 580 voids entry of default judgment. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1743 ["Vacating the default judgment has no necessary effect on the underlying default and simply returns the defendant to the default status *quo ante*. [Citation.] *Ordinarily when a judgment is vacated on the ground the damages awarded exceeded those pled, the appropriate action is to modify the judgment to the maximum amount warranted by the complaint*. [Citations.]")

Here, respondents prayed for compensatory damages and punitive damages according to proof. In the body of the complaint, in the third cause of action for unfair business practices, respondents alleged that appellants owed the Board of Equalization for sales and use taxes in an amount in excess of $150,000. Respondents sought "restitution to [respondents] for any economic losses as a result of the state of California, Board of Equalization collection activity." Thus, a specific amount of damages was alleged in the body of the complaint. At the prove up hearing, the trial court found that the amount of damages for restitution relating to the Board of Equalization collection activity was $97,572.45.

Similarly, in an attachment to the complaint labeled "Exemplary Damages Attachment," appellants sought $500,000 in exemplary or punitive damages. Under section 425.115, subdivision (d), this attachment satisfied the requirements of section 580

because it provided appellants notice that respondents were seeking $500,000 in the suit that was being filed against appellants. At the prove up hearing, the trial court found that respondents were entitled to punitive damages, but limited the amount to three times the compensatory damage, or $292,717.

On this record, we conclude that respondents complied with section 580.

2. Section 425.11

Section 425.11, provides, in relevant parts, that:

> "(b) When a complaint is filed in an action to recover damages for personal injury or wrongful death, the defendant may at any time request a statement setting forth the nature and amount of damages being sought.…
>
> "(c) If no request is made for the statement referred to in subdivision (b), the plaintiff shall serve the statement on the defendant before a default may be taken."

Here, the complaint was not an action for personal injury or wrongful death. Rather, it was an indemnification action or a business tort action. Thus, any failure to comply with section 425.11 in this case does not affect the default judgment.

3. Section 425.115

Section 425.115, subdivision (b) provides that, "[t]he plaintiff preserves the right to seek punitive damages pursuant to Section 3294 of the Civil Code on a default judgment by serving upon the defendant the following statement, or its substantial equivalent." The statement provides formal notice to the defendant that plaintiff "reserves the right to seek $ (Insert dollar amount) in punitive damages when" plaintiff "seeks a judgment in the suit filed against you." (§ 425.115, subd. (b).) Section 425.115, subdivision (f) provides that "[t]he plaintiff shall serve the statement upon the defendant pursuant to this section before a default may be taken, if the motion for default judgment includes a request for punitive damages."

Here, the complaint itself provides notice to appellants that respondents sought punitive damages. In an attachment to the complaint, on a form pleading, respondents

provided notice that they sought exemplary damages in the amount of "$500,000 or according to proof." This attachment satisfies the requirements of section 425.115 because it was substantially equivalent to the statement detailed in section 425.115, subdivision (b). Thus, respondents complied with section 425.115.

However, appellants contend that respondents could not comply with section 425.115 by listing the amount of punitive damages in the attachment to their complaint because Civil Code section 3295, subdivision (e) provides that "[n]o claim for exemplary damages shall state an amount or amounts." As appellants acknowledge, section 425.115, subdivision (d), provides that: "A plaintiff who serves a statement on the defendant pursuant to this section shall be deemed to have complied with Sections 425.10 and 580 of this code and Section 3295 of the Civil Code." Here, respondents complied with Civil Code section 3295 when, in their complaint, they claimed punitive damages in an amount according to proof, and, in a separate attachment, provided notice that they sought "$500,000 or according to proof."

B. Collateral Estoppel

Appellant next contends that entry of default and default judgment in this case was barred by the doctrine of collateral estoppel because this court ruled on the same issue in the prior case of *Oliver, supra*, F051193. We disagree. First, this court did not address the issue of entry of default in our prior opinion. We only vacated the entry of default judgment because respondents failed to comply with the requirements of section 580. Second, collateral estoppel would apply in this case only to prevent the litigation of the same issues between the same parties. (See *Syufy Enterprises, Inc. v. City of Oakland* (2002) 104 Cal.App.4th 869, 878.) However, the issue of compliance with section 580, where the body of an attachment to the complaint does not provide specific amount of damages, is legally different from the issue of compliance with section 580, where the body of the complaint and an attachment to the complaint does list specific amounts of damages. Thus, the doctrine of collateral estoppel is inapplicable in this case.

C. Request for Reconsideration

Appellants also contend that the trial court erred in granting appellant's request for reconsideration of the trial court's December 16, 2008 order because that request did not contain any new or different facts as required by section 1008. Appellants argue that the trial court could not entertain the request for reconsideration because the requirements of section 1008 are jurisdictional. We disagree that there was any reversible error in this case.

Section 1008 provides, in pertinent parts, that:

> "(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order…. [¶] … [¶]
>
> "(e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

In *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*), the California Supreme Court held that section 1008 prohibits a party from making a renewed motion not based upon new facts or law, but does not limit a trial court's ability to reconsider its previous interim order on its own motion. (*Id.* at pp. 1096-1097.) However, the Court stated: "We cannot prevent a party from communicating the view to a court that it should reconsider a prior ruling (although any such communication should never be ex parte). We agree that it should not matter whether the 'judge has an unprovoked flash of understanding in the middle of the night' [citation] or acts in response to a party's suggestion. If a court believes one of its prior interim orders was erroneous, it should be

able to correct that error no matter how it came to acquire that belief." (*Le Francois*, *supra*, 35 Cal.4th at p. 1108.) In *In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301 (*Barthold*), the appellate court held that, "the trial court's inherent authority to correct its errors applies even when the trial court was prompted to reconsider its prior ruling by a motion filed in violation of section 1008." (*Id*. at pp. 1303-1034.)

Here, respondents' request for reconsideration of the trial court's order violated section 1008 because it stated no new or different facts. The fact that the trial court missed a factual citation that was provided in respondents' application is not a new or different fact because that same fact was before the trial court when it issued its order. However, there is no reversible error because in this case, in the subsequent order, the trial court did not grant respondents' request for reconsideration. The order does not contain any language stating that the trial court was granting the request for reconsideration. Rather, it vacated the prior order and granted appellants' prior application. Thus, we interpret the trial court's order to be a reconsideration of its previous decision on its own motion.

In any event, any error is harmless. Article VI, section 13 of the California Constitution precludes reversal of a judgment "for any error as to any matter of procedure, unless, after an examination of the entire cause … the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Thus, as *Barthold*, *supra*, explained, "the California Constitution requires that in any case in which a trial judge reconsiders an erroneous order, and enters a new order that is substantively correct, the resulting ruling must be affirmed regardless of any procedural error committed along the way." (*Barthold*, *supra*, 158 Cal.App.4th at p. 1313.) Here, the trial court's decision is substantively correct because respondents complied with all the statutory requirements for a default judgment in the amount of $97,572.45 in compensatory damages and $292,717 in punitive damages. Moreover, it is clear that if

we remand to the trial court to reconsider the issue on its own motion, it would reach the same result again.

Thus, there was no reversible error by the trial court's decision to vacate its prior order and grant respondents' prior application.

D. Public Policy

Finally, appellants contend that we should vacate the default and default judgment because there is a strong public policy against defaults and default judgments. However, that public policy already has been considered by the Legislature when it created the various statutory requirements for entry of default and default judgment. Here, respondents have fulfilled all those statutory requirements. Moreover, this is not a case where appellants have provided strong factual or legal reasons why their default or default judgment should be set aside. Thus, we find no reason to vacate the default and default judgment.

DISPOSITION

The judgment is affirmed.

_____
Ardaiz, P.J.

WE CONCUR:

_____
Levy, J.

_____
Dawson, J.